TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 2

CONSTITUTIONAL PROVISION INVOLVED 2

QUESTIONS FOR REVIEW 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT

I. The Trial Court's Refusal to Consider Evidence Denying Respondent's Title to the Real Estate in Question Constituted a Denial of Due Process as Guaranteed by the Fourteenth Amendment to the Constitution of the United States 5

II. The Trial Court's Refusal to Consider Evidence Which Would Establish the Paramount Title of the United States of American in the Real Estate in Question and Petitioner's Claim Under Permit from the United States of America to Occupy and Use this Real Estate Constituted a Denial of Due Process as Guaranteed by the Fourteenth Amendment to the Constitution of the United States 7

CONCLUSION 9

TABLE OF CITATIONS

Cases:

Baltimore & O.R. Co., et al. v. United States, 298 U.S. 349 (1936) 5

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930) 5

Cissna v. Tennessee, 246 U.S. 289 (1918) 8

City Council of Greenville v. White, 194 Miss. 145 (1943) 7

Country Club Tower Corp. v. Tower Management Corp., 275 F. Supp. 488 (D. Mont. 1967) 5

Cases, continued: Page

Ellis v. Sutton, 129 Miss. 102 (1921) 7

Emerick v. Tavener, 9 Gratt. (50 Va.) 220 (1852) 6

Graham v. Gill, 223 U.S. 643 (1912) 8

Lear v. Adkins, 395 U.S. 653 (1969) 8

Matthews v. W.T. Freeman Co., 191 Va. 385 (1950) 6

Morris v. U.S., 174 U.S. 196 (1899) 8

Smoot Co. v. Washington Airport, 283 U.S. 348 (1931) 8

Stover v. Davis, 57 W. Va. 196 (1905) 6

Turpin v. Saunders, 32 Gratt. (73 Va.) 27 (1879) 6

United States v. Dern, 289 U.S. 352 (1933) 8

Voss v. King, 33 W. Va. 236 (1889) 6

Weilder v. McComb, 10 Tex. Civ. App. 85 (1895) 7

Constitution, Regulations, Statutes, Rules:

United States Constitution, Fourteenth Amendment . . . . . *passim*

Other Authorities:

49 Am. Jur.2d *Landlord and Tenant* §109 *et seq.* 6

11 Michie's Jurisprudence, *Landlord and Tenant* §61 6

TABLE OF CONTENTS OF APPENDIX

Order of the Supreme Court of Virginia, dated January 10, 1975, denying Petitioner's Petition for Writ of Error 1a

Order of the Supreme Court of Virginia, dated March 10, 1975, denying Petitioner's Petition for Rehearing 1a

Order of the Supreme Court of Virginia, dated April 11, 1975, granting a stay of execution of judgment until June 9, 1975 . . . . . 2a

Page

Letter from the Deputy Assistant Secretary for Fish and Wildlife and Parks to Old Town Yacht Basin, Inc., dated January 24, 1973. . . . . .3a

Letter from the Assistant Secretary of the Interior to Old Town Yacht Basin, Inc., dated May 17, 1973 . . . . . .4a

Order of the United States District Court for the Eastern District of Virginia, Alexandria Division, dated May 2, 1974 denying Petitioner's Motion for Removal 6a

Order for Final Judgment, *U.S. v. Bryant*, Civil Action No. 2211-73, U.S. District Court for the District of Columbia, dated January 29, 1975 . . . . . .7a

Order of the Circuit Court of the City of Alexandria, dated July 10, 1974 . . . . . .8a

ED THROUGH

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No.

OLD TOWN YACHT BASIN, INC.,

Petitioner,

v.

CITY OF ALEXANDRIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

OPINION BELOW

The Order of the Supreme Court of Virginia denying etitioner's Petition for Writ of Error, the Order of the upreme Court of Virginia denying petitioner's Petition or Rehearing and the Order of the Supreme Court of irginia granting Petitioner a Stay are not reported but re appended herewith.

R OUGH

JURISDICTION

The judgment of the Supreme Court of Virginia denying petitioner's Petition for Writ of Error was entered on January 10, 1975. The judgment of the Supreme Court of Virginia denying petitioner's Petition for Rehearing was entered on March 10, 1975. On April 11, 1975, the Supreme Court of Virginia entered an Order Staying Execution of Judgment until June 9, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257 (3).

CONSTITUTIONAL PROVISION INVOLVED

U.S. CONST., AMEND XIV, Sec. 1.

"... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS FOR REVIEW

1. The trial court's refusal to consider evidence denying respondent's title to the real estate in question constituted a denial of due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

2. The trial Court's refusal to consider evidence which would have established the paramount title of the United States of America in the real estate in question and petitioner's claim under permit from the United States of America to occupy and use this real estate constituted a denial of due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

The respondent City of Alexandria, hereinafter referred to as City, instituted an action for rent in the Circuit Court for the City of Alexandria (hereinafter referred to as trial court), alleging ownership of certain waterfront real estate and petitioner's indebtedness to the City in the amount of $7,800 for rent due and unpaid. Based upon statutory authority and historical records, as well as an unequivocal declaration of ownership by the United States of America as set forth in at least two letters from the United States Department of the Interior to petitioner dated January 24, 1973 and May 17, 1973 (App. 3a & 4a), petitioner sought removal of this action to the United States District Court for the Eastern District of Virginia. In an Order entered May 2, 1974 (App. 6a), the District Court ruled that the case was "an action for rent" and the petition for removal was denied.

Thereafter, in the trial court, petitioner sought to defend against the City's claim by demonstrating, *inter alia,* that paramount title to the real estate in question was in the United States of America. In its responsive pleading, petitioner specifically denied the City's claim of ownership. In a further effort to establish its defense through pre-trial discovery, petitioner requested certain admissions concerning documents which clearly demonstrated the paramount title of the United States of America to the property in question. (See Record of Trial, Exhibits B through K attached to Defendant's Request for Admissions of Facts and Genuineness of Documents.) By virtue of the City's failure to contest the genuineness of these documents, their authenticity was admitted.

It is significant to note that during the pendency of this alleged "rent action," title to the land along the

Alexandria waterfront was, and in fact still is, being litigated in the United States District Court for the District of Columbia. That action was brought by the United States Government against all owners of waterfront land. *U.S. v. Herbert Bryant, et al.*, Civil Action No. 2211-73. It should also be noted that on January 29, 1975, an Order was entered in that matter, dismissing numerous defendants, including both petitioner and the respondent (App. 7a).

The instant case came up for trial by jury on June 21, 1974, but on the City's Motion for Summary Judgment, the jury was dismissed and the case was argued to the Court on the pleadings, pre-trial discovery and certain stipulations. However, the trial court refused to consider any of petitioner's evidence establishing the paramount title of the United States as a defense, holding that "the tenant is estopped [sic] the landlord title unless he claims title himself . . . ." (Transcript, June 21, 1974, p. 22) Petitioner's exception to this ruling was noted on the record.

On July 10, 1974, the trial court entered an Order granting the City's Motion for Summary Judgment, entering judgment against petitioner in favor of the City in the sum of $7,800. In that Order (App. 8a), the trial court specifically held that "the defendant Tenant [Petitioner] is estopped to deny the plaintiff Landlord's title unless he claims title in himself, which the defendant has not done . . . ."

After unsuccessfully arguing a motion to vacate the aforementioned judgment, petitioner filed its Notice of Appeal and Assignments of Error to the Supreme Court of Virginia. In this Notice and the briefs subsequently filed in support thereof, petitioner argued, *inter alia*, that

the trial court should have considered evidence concerning the paramount title of the United States of America to the real estate in question.

The petition for writ of error was denied by the Supreme Court of Virginia on January 10, 1975 (App. 1a). Petitioner's request for rehearing was denied on March 10, 1975 (App. 1a).

REASONS FOR GRANTING THE WRIT

I.

THE TRIAL COURT'S REFUSAL TO CONSIDER EVIDENCE DENYING RESPONDENT'S TITLE TO THE REAL ESTATE IN QUESTION CONSTITUTED A DENIAL OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In defining a litigant's rights under the Fourteenth Amendment to the Constitution, this Court has held that the due process clause guarantees to each litigant a full hearing and the right to introduce evidence. *Baltimore & O.R. Co. v. United States,* 298 U.S. 349, 80 L.Ed. 1209, 56 S.Ct. 797 (1936). This right clearly encompasses the litigant's right to be heard in its defense. *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673, 74 L.Ed. 1107, 50 S.Ct. 451 (1930). While it is obvious that this right is not absolute, but rather one limited to the introduction of evidence relevant to the subject of the litigation, where the law on the subject is clear and the trial court persists in its refusal to permit evidence in support of a defense, the due process rights of the litigant are violated. *See Country Club Tower Corp. v. Tower Management Corp.,* 275 F. Supp. 468 (D. Mont. 1967).

It is traditionally held that where the relationship of landlord and tenant has been once established, the tenant is estopped to deny his landlord's title in any action brought against him by the landlord to vindicate his rights under the tenancy. 49 Am. Jur.2d *Landlord and Tenant* §109 *et seq.* This is the general state of the law in Virginia. 11 Michie's Jurisprudence, *Landlord and Tenant* §61. However, in Virginia, as in most other jurisdictions, the rule is fraught with exceptions. The landlord's title may be challenged after the tenant has relinquished possession (*Emerick v. Tavener,* 9 Gratt. [50 Va.] 220 (1852); *Stover v. Davis,* 57 W. Va. 196, 49 S.E. 1023 [1905]) or disclaimed or disavowed the landlord's title. *Matthews v. W. T. Freeman Co.*, 191 Va. 385, 60 S.E.2d 23 (1950). In such a case the tenant may claim the fee in himself or a third person. *Voss v. King,* 33 W. Va. 236, 10 S.E. 402 (1889). Most significantly, if the tenant is threatened with a suit upon a paramount title, the threat, under such circumstances, may be equivalent to an eviction, and the tenant may thereupon submit in good faith and attorn to the party holding valid title. *Turbin v. Saunders,* 32 Gratt. (73 Va.) 27. (1879)

In light of the clear authority which should permit petitioner to defend in the action below by demonstrating the existence of title in someone other than the City and its claim under their title, the action of the trial court in denying petitioner the right to introduce evidence of such paramount title and its claim thereunder constituted a denial of due process of law.

II.

THE TRIAL COURT'S REFUSAL TO CONSIDER EVIDENCE WHICH WOULD HAVE ESTABLISHED THE PARAMOUNT TITLE OF THE UNITED STATES OF AMERICA IN THE REAL ESTATE IN QUESTION AND PETITIONER'S CLAIM UNDER PERMIT FROM THE UNITED STATES OF AMERICA TO OCCUPY AND USE THIS REAL ESTATE CONSTITUTED A DENIAL OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In addition to the previously cited authority, public policy alone should permit a defense based upon title. In an action brought by the landlord to establish his right in certain crops and to enjoin the tenant from removing and selling same, the tenant was permitted to defend by refuting the landlord's authority. The court observed:

> "If land is public land—the title in the government—a tenant is not bound by the ordinary rule which forbids him to dispute his landlord's title. * * * On the contrary, he may show the title to be in the government. It would be against public policy to hold otherwise. *Ellis v. Sutton,* 126 Miss. 102, 88 So. 519, 521 (Sup. Ct. Miss. 1921)"

See also Weilder v. McComb, Civ. App. 85, 30 S.W. 822 (Tex. Civ. App. 1895).

Similarly, in the case of *City Council of Greenville v. White,* 194 Miss. 145, 11 So.2d 818 (Sup. Ct. Miss. 1943), the court held:

> "When the title of the property in controversy is in the government, the alleged tenant or licensee of someone else is not bound by the rule which forbids him to dispute the title of him by whose permission he enters upon the premises, since to so hold would be violative of public policy."

Clearly, the trial court's refusal to consider matters of public policy does not, in and of itself, constitute a denial of due process sufficient to raise a "substantial Federal question." However, in light of clear case law holding the real estate in question to be the property of the United States (*Morris v. United States*, 174 U.S. 196, 43 L.Ed. 946, 19 S.Ct. 649 [1899]; *Smoot Co. v. Washington Airport*, 283 U.S. 348, 75 L.Ed. 1109, 51 S.Ct. 474 [1931]; *United States v. Dern*, 289 U.S. 352, 77 L.Ed. 1245, 53 S.Ct. 611 [1933]), the trial court's refusal to permit the introduction of any evidence on this point does constitute a denial of due process and raise a substantial federal question. *See Graham v. Gill*, 223 U.S. 643, 56 L.Ed. 586, 32 S.Ct. 396 (1912); *Cissna v. Tennessee*, 246 U.S. 289, 62 L.Ed. 720, 38 S.Ct. 306 (1918).

In *Lear v. Adkins*, 395 U.S. 653, 23 L.Ed.2d 610, 89 S.Ct. 1902 (1969), this Court reversed previous holdings that the defense of patent invalidity was unavailable to a company in a suit for royalties brought by an inventor. In holding that the doctrine of estoppel in such cases was violative of federal policy, the Court noted that to do otherwise "would be inconsistent with the aims of federal patent policy . . . ." *Lear*, 395 U.S. at 673. To deny it the right to assert the paramount title of the United States of America as the granting authority by which petitioner occupies the real estate in question would result in an equally flagrant violation of public policy, a rejection of this Court's previous rulings regarding title to the real estate in question, and a denial of petitioner's constitutionally guaranteed right to due process of law.

CONCLUSION

For these reasons, a Writ of Certiorari should issue and the decision of the Supreme Court of Virtinia should be reversed

Respectfully submitted,

DAVID ROSS ROSENFELD
118 South Royal Street
Post Office Box 96
Alexandria, Virginia 22313
(703) 548-2600

Attorney for Petitioner.

APPENDIX A

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 10th day of January, 1975.

The petition of Old Town Yacht Basin, Inc., for a writ of error and supersedeas to judgments rendered by the Circuit Court of the City of Alexandria on the 10th day of July, 1974, and the 11th day of September, 1974, respectively, in a certain motion for judgment then therein depending, wherein the City of Alexandria, etc., was plaintiff and the petitioner was defendant, having been maturely considered and a transcript of the record of the judgments aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgments complained of, doth reject said petition, and refuse said writ of error and supersedeas, the effect of which is to affirm the judgments of the said circuit court.

A Copy,
Teste:
Howard G. Turner, Clerk
By: /s/Allen L. Leary
Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 10th day of March, 1975.

Old Town Yacht Basin, Inc., Plaintiff in error,
against Record No. 741082
City of Alexandria, Defendant in error.

Upon a Petition for Rehearing

On mature consideration of the petition of the plaintiff in error to set aside the judgment rendered herein on the 10th day of January, 1975, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,
Teste:
/s/ H. Turner
Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 11th day of April, 1975.

Old Town Yacht Basin, Inc., Plaintiff in error,
against Record No. 741082
City of Alexandria, Defendant in error.

Order Staying Execution of Judgment

Upon consideration of the application of the plaintiff in error, by counsel, praying for a stay of execution of the judgment rendered herein on March 10, 1975, in order that it may have reasonable time and opportunity to present to the Supreme Court of the United States a petition for appeal to review the judgment of this court, it is now ordered that the execution and enforcement of the judgment of this court in the above-entitled case rendered on March 10, 1975, be, and the same is hereby, stayed, until the 9th day of June, 1975, on the expiration of which time the same may be enforced, unless before that time a notice of appeal to the Supreme Court of the

United States has been filed in accordance with the Rules of the Supreme Court of the United States and the case is thereafter docketed within the time provided by the Rules of that court, in which event enforcement thereof shall be stayed until the final determination of the case by that court.

A Copy,
Teste:
/s/ H. Turner
Clerk

United States Department of the Interior
Office of the Secretary
Washington, D.C. 20240

In Reply Refer To:
L2415-LA

Jan. 24, 1973

Dear Mr. Lang:

This will respond to your telephone inquiry concerning the real property ownership of the United States in the area of the waterfront of Alexandria.

Please be advised that the United States is the owner of all fast and submerged lands lying easterly of the high-water mark of 1791. In the vicinity of the area presently occupied by you, it encompasses all lands easterly of Union Street between Wilkes Street and Gibbon Street. Persons who are claiming lands owned by the United States in that area include Pommander Walk, a limited partnership; the City of Alexandria; Southern

Railway; and your corporation. As to these lands, which are east of the high-water mark of 1791, the United States is the fee owner.

We trust this information will be of assistance to you.

Sincerely yours,

/s/Sgd. Curtis Bohler
Deputy Assistant Secretary for
Fish and Wildlife and Parks

Mr. J. G. Lang, Jr.
President, Old Town Yacht Basin, Inc.
500 South Union Street
Alexandria, Virginia 22314

United States Department of the Interior
Office of the Secretary
Washington, D.C. 20240

In Reply Refer To:
L2415-LA May 17, 1973

Gentlemen:

The lands presently occupied by you, easterly of Union Street between Wilkes Street and Gibbon Street are, by virtue of the cession from the State of Maryland for the seat of government, owned by the United States of America and are under the jurisdiction of the Department of the Interior.

This will authorize your corporation to continue the occupancy of those lands for the purpose of operating a marina and related facilities. This permission may be

revoked by us at any time without prior notice and shall not be deemed as vesting in you any interest in the land or facilities which presently exist in the area described.

You are not to undertake any permanent improvements or major construction activities in the area without the approval of the Director, National Capital Parks, National Park Service, 1100 Ohio Drive, S. W., Washington, D. C. His representative will contact you shortly to discuss the possibility of a concession agreement for the operation of a marina in that area, and an appropriate interim fee.

Any questions concerning this matter should be addressed to the Director, National Capital Parks, National Park Service.

Sincerely yours,

/s/[Illegible]
Assistant Secretary of the
Interior

Old Town Yacht Basin, Inc.
500 South Union Street
Alexandria, Virginia 22314

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(ALEXANDRIA DIVISION)

OLD TOWN YACHT BASIN, INC.	:	
Petitioner,	:	
v.	:	NO. 106-74
CITY OF ALEXANDRIA, a	:	
municipal corporation of	:	
Virginia,	:	
Respondent.	:	

ORDER

THIS CAUSE came on to be heard upon the Petition for Removal filed by Old Town Yacht Basin, Inc., upon the Motion to Remand in Response to Petition for Removal filed by the City of Alexandria, and was argued by counsel

AND IT APPEARING TO THE COURT that the original cause of action filed by the City of Alexandria against Old Town Yacht Basin, Inc. in the Circuit Court for the City of Alexandria, Virginia, being an action for rent, should not be removed to this Court under the provisions of Title 28, U.S.C., it is therefore

ORDERED, ADJUDGED AND DECREED, that the captioned case be and it hereby is remanded to the Circuit Court for the City of Alexandria, Virginia, for further proceedings in accordance with the pleadings filed therein.

ENTERED this 2nd day of May, 1974.

/s/[Illegible]
JUDGE

IN THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
Plaintiff,

v.

HERBERT BRYANT, INC., et al.,
Defendants.

CIVIL ACTION
NO. 2211-73

ORDER FOR FINAL JUDGMENT

On the prior memorandum and order having been entered herein on December 9, 1974 dismissing the complaint for lack of jurisdiction as to all defendants owning property in the Commonwealth of Virginia, it appearing to the Court that there is no just reason for delay in entering final judgment on defendants' motions to dismiss, it is pursuant to Rule 54(b) of the Federal Rules of Civil Procedure,

ORDERED that final judgment be entered herein dismissing the complaint as to defendants Thomas H. Andrews, Inc.; Norton and Company, Inc.; The Texas Company; Robinson Terminal Warehouse Corporation; Kristos Kiriakow and Anna Kiriakow; Leroy S. Bendheim; Max Ratner; Charcoal House, Inc.; Old Dominion Boat Club; Sand & Gravel Properties, Inc.; Robinson Realty Corporation; Potomac Arms Corporation; John C. Richards; Beverly D. Turner; Donald C. Wells; Chester G. Pierce; Herbert W. O'Meara; Russell S. Crenshaw; Flavienne G. Crenshaw; Alexandria Service, Incorporated; Virginia Electric and Power Company; Old Town Yacht Basin, Inc.; Roy C. Bragg; Herbert S. Billowitz; Southern Railway Company; Pommander Walk Limited Partner-

ship; MCE Corporation; United Virginia Bank/First & Citizens National Bank; and City of Alexandria.

An order of dismissal is not entered at this time with respect to the following defendants: Commonwealth of Virginia; Herbert Bryant Incorporated; Potomac Electric Power Company; Slater's Lane, Inc.; A. Slater Lamond; and Jaquelin R. S. Lamond.

Dated: Jan. 29, 1975 /s/[Illegible]
United States District Judge

VIRGINIA:

IN THE CIRCUIT COURT
OF THE CITY OF ALEXANDRIA

CITY OF ALEXANDRIA, a municipal corporation of Virginia, :
Plaintiff, :
v. : At Law No. 2449
OLD TOWN YACHT BASIN, INC., :
Defendant. :

ORDER

THIS CAUSE came on to be heard on the 21st day of June 1974, upon the Motion for Judgment for Rent with Exhibits filed by plaintiff herein, upon the Grounds of Defense, Amended Grounds of Defense and Counterclaim filed by the defendant filed, upon the Answer to Counterclaim filed by plaintiff, upon a Request for Admission of Facts and Genuineness of Documents by plaintiff, upon the defendant's Response to said Request, upon a Request for Admission of Facts and Genuineness of Documents by defendant, upon the plaintiff's oral

response in open Court to said Request, upon the Motion for Summary Judgment by plaintiff, upon the stipulations by plaintiff and defendant, and was argued by counsel.

AND IT APPEARING TO THE COURT that the lease dated March 29, 1956, and recorded in Deed Book 430 at page 27 among the land records of the City of Alexandria, Virginia, entered into by the defendant's predecessors and the plaintiff, and assigned to the defendant with consent to the assignment by the plaintiff, expired on March 29, 1966; that negotiations toward a new rental agreement continued between plaintiff and defendant through June 1968; and that payments of rent in the amount of ONE DOLLAR ($1.00) per year were made thereafter on April 1, 1966, April 1, 1967, and May 13, 1968, and that such payments did not create an extension or renewal of the lease on a year to year basis;

AND IT FURTHER APPEARING TO THE COURT that on July 1, 1968, the plaintiff and defendant agreed to a tenancy from month to month at a rental in the sum of THREE HUNDRED DOLLARS ($300.00) per month by virtue of a letter dated June 17, 1968, marked plaintiff's Exhibit B and defendant's payment of the rent demanded commencing on July 1, 1968, and continuing through November 1971, all rent being current through November 1971; and that rent is due and owing the City for defendant's use and occupancy of the City owned land for December 1971 through January 1974, in the sum total of SEVEN THOUSAND EIGHT HUNDRED DOLLARS ($7,800.00);

AND IT FURTHER APPEARING TO THE COURT that the defendant Tenant is estopped to deny the plaintiff Landlord's title unless he claims title in himself, which the defendant has not done;

AND IT FURTHER APPEARING TO THE COURT that there is no question of fact to be determined by the jury; therefore, it is hereby

ADJUDGED, ORDERED and DECREED that the plaintiff's Motion for Summary Judgment for Rent in the sum total of SEVEN THOUSAND EIGHT HUNDRED DOLLARS ($7,800.00) is granted and the defendant's Counterclaim is dismissed. The Court hereby notes that plaintiff and defendant agree that the sum of $300 is to be credited to the defendants account.

AND IT IS SO ORDERED this 10th day of July 1974.

/s/[Illegible]
J U D G E
JLD 23, page 93

SEEN:
/s/ J. Howard Middleton, Jr.
J. Howard Middleton, Jr.
Assistant City Attorney
Counsel for Plaintiff

SEEN AND EXCEPTION HEREBY NOTED:

LUTZ & KAVALJIAN

/s/Herman W. Lutz
Herman W. Lutz
Counsel for Defendant

Supreme Court, U. S.
FILED
JUL 8 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1548

OLD TOWN YACHT BASIN, INC.,
Petitioner,

v.

CITY OF ALEXANDRIA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

CYRIL D. CALLEY
Deputy City Attorney
City of Alexandria, Virginia

J. HOWARD MIDDLETON, JR.
Assistant City Attorney
City of Alexandria, Virginia
320 King Street, Suite 200
Alexandria, Virginia 22314
(703) 750-6287
Attorneys for Respondent

July 8, 1975

WILSON - EPES PRINTING CO., INC. - RE 7-8002 - WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	2
STATEMENT OF REASONS FOR DENYING REVIEW	
I. The Trial Court's Ruling to Exclude Evidence on the Issue of Title to Real Estate in a Suit for Rent, Pursuant to Established Landlord-Tenant Law, is Not a Violation of the Fourteenth Amendment to the Constitution of the United States	4
II. There are no Special and Important Reasons for this Court in its Sound Discretion Under Rule 19, Supreme Court Rules, to Review on Writ of Certiorari the Decision of the Supreme Court of Virginia to Refuse the Petitioner's Writ of Error	8
CONCLUSION	9

TABLE OF CITATIONS

Cases:

Chaplinsky v. *State of New Hampshire*, 315 U.S. 568 (1942)	6
City Council of Greenville v. *White*, 194 Miss. 145, 11 So.2d 818 (1945)	6, 7
Ellis v. *Sutton*, 126 Miss. 102, 88 So. 519 (1921)	6, 7
Emerick v. *Tavener*, 9 Gratt. (50 Va.) 220 (1852)	5
Glen Falls Portland Cement Co. v. *Delaware & Hudson Co.*, 66 F.2d 490 (Second Cir. 1933) cert. den. 290 U.S. 697	6
Hall & Paulson Furniture Co. v. *Wilbur*, 4 Wash. 644, 30 P. 655 (1892)	7
Reusens v. *Lawson*, 91 Va. 226, 21 S.E. 347 (1895)	5

TABLE OF CITATIONS—Continued

	Page
Stover v. *Davis*, 57 W.Va. 196, 49 S.E. 1023 (1905)	5
United States v. *Herbert Bryant, et al.*, Civil Action No. 2211-73 (In the United States District Court for the District of Columbia)	3
Voss v. *King*, 33 W.Va. 236, 10 S.E. 402 (1889)	5
Constitution, Regulations, Statutes, Rules:	
United States Constitution, Fourteenth Amendment	*passim*
Rule 19, Supreme Court Rules	8
Other Authorities:	
49 Am. Jur.2d, *Landlord and Tenant* § 109	4
11 Michie's Jurisprudence, *Landlord and Tenant* § 61 et seq.	5, 7

TABLE OF CONTENTS OF APPENDIX

Order of the Circuit Court of the City of Alexandria, Virginia, Denying Petitioner's Motion to Vacate Judgment, dated September 11, 1974	1a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1548

OLD TOWN YACHT BASIN, INC.,
Petitioner,

v.

CITY OF ALEXANDRIA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

OPINIONS BELOW

No opinion was written by the Supreme Court of Virginia or by the trial court. The Order of the Circuit Court of the City of Alexandria granting judgment to the respondent, the Order of the Circuit Court of the City of Alexandria denying petitioner's motion to vacate judgment, the Order of the Supreme Court of Virginia denying petitioner's Petition for Writ of Error, the Order of the Supreme Court of Virginia denying petitioner's Petition for Rehearing and the Order of the Supreme Court of Virginia granting petitioner a Stay are reprinted at pages 1a, 2a and 6a through 10a of the Petition, except for the Order denying petitioner's mo-

tion to vacate judgment which is reprinted herein as Appendix A.

QUESTIONS PRESENTED

1. Whether the trial court's ruling to exclude evidence on the issue of title to real estate in a suit for rent, pursuant to established landlord-tenant law, is a violation of the Fourteenth Amendment to the Constitution of the United States.

2. Whether there are special and important reasons for this Court in its sound discretion under Rule 19, Supreme Court Rules, to review on writ of certiorari the decision of the Supreme Court of Virginia to refuse the petitioner's writ of error.

STATEMENT OF THE CASE

The City of Alexandria, a municipal corporation of Virginia (hereinafter referred to as City), is the titleholder of a certain parcel of land along the Alexandria, Virginia, waterfront. The deed to said parcel is dated July 28, 1942, and is recorded in Deed Book No. 192, page 391, among the land records of the City of Alexandria. As owner in possession of this property, the City entered into a lease agreement on March 29, 1956, with Alexandria Marina, Inc. which at a later date assigned the lease to the Old Town Yacht Basin, Inc., the petitioner herein. Rent was paid to the City through December 1971, under the lease as well as under a month to month tenancy following the expiration of the original lease term.

Suddenly in January 1972, petitioner stopped paying rent to the City and has not made a rent payment to this day. The City has requested rent payments continuously and entered into good faith negotiations for new lease terms which failed. Consequently, the City instituted

an action for rent due and owing the City in the Circuit Court for the City of Alexandria, Virginia. A petition for removal to the United States District Court for the Eastern District of Virginia by the petitioner herein was denied for the reason that this action for rent was properly in the state courts. (Pet. App. 6a). On the pleadings, pretrial discovery, stipulations by both parties and argument, the trial court granted the City's motion for summary judgment and entered a judgment order in favor of the City for rent due and unpaid. The petitioner's motion to vacate the judgment was denied by the trial court and its petition for writ of error was denied by the Supreme Court of Virginia on January 10, 1975.

In the trial court and in its petition to the Supreme Court of Virginia, petitioner raised several legal defenses to the action for rent, including whether the written lease had been renewed and whether the $300 per month rent had been agreed upon. In each instance the court ruled against petitioner. As an additional defense petitioner claimed that it should not be liable for rent to the City because title to the subject property resided in the United States Government and not the City.[1] On this issue, which petitioner is raising in this petition, the state courts held that under Virginia law in such circum-

---

[1] Petitioner does not dispute that the City is the titleholder of record of the subject property; the City will remain the titleholder of record unless the appropriate court finally rules otherwise. The United States Government, however, claims ownership in land along the Alexandria waterfront including the subject property and has instituted litigation to try title to all waterfront property in the federal courts in the case of *United States* v. *Herbert Bryant, et al.*, Civil Action No. 2211-73 (In the United States District Court for the District of Columbia). An order dismissing that case as to most defendants (Pet. App. 7a), is on appeal to the United States Court of Appeals for the District of Columbia Circuit.

stances the tenant may not deny the landlord's title in a landlord-tenant dispute. (Pet. App. 8a).

STATEMENT OF REASONS FOR DENYING REVIEW

I.

THE TRIAL COURT'S RULING TO EXCLUDE EVIDENCE ON THE ISSUE OF TITLE TO REAL ESTATE IN A SUIT FOR RENT, PURSUANT TO ESTABLISHED LANDLORD-TENANT LAW, IS NOT A VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

It is clear from the record that petitioner enjoyed a full hearing in the trial court. The judgment entered in favor of the City was based on extensive stipulations of facts, pre-trial discovery and admission of documentary evidence. Argument on the law was complete both on the motion for summary judgment at the trial and at a hearing on the petitioner's motion to vacate the judgment.

The sole issue raised by the petition is that the trial court wrongfully ruled to exclude proffered evidence denying the City's title to the subject property. The trial court ruled that as a matter of Virginia law the tenant was bound to honor the lease contract and could not avoid its obligations by attempting to set up title in a third party, a general rule followed by not less than 34 states. 49 Am. Jur.2d, *Landlord and Tenant*, § 109. In other words, as a matter of state law, the evidence proffered by petitioner to disprove the City's title to the property was irrelevant to the outcome of this case because it had no effect on a tenant's obligation to pay rent to his landlord, and unless special circumstances occur, the tenant owes a reasonable rent to the person who has granted him use of the property as his landlord and

cannot claim a windfall by challenging the landlord's title. The possession of a tenant is the possession of the landlord and a tenant will not be allowed to deny his landlord's title. *Reusens* v. *Lawson*, 91 Va. 226, 21 S.E. 347 (1895). Proof of title is not required in an action between landlord and tenant because a party is not permitted to dispute the original title of him by whom he has been let into possession. *Emerick* v. *Tavener*, 9 Gratt. (50 Va.) 220 (1852). "No matter how destitute of title the landlord may be or how clean the title of the stranger may be in the land, the tenant cannot deny the title to the former, nor affirm that of the latter, in his defense of the landlord's action for land." 11 Michie's Jurisprudence, *Landloard and Tenant*, § 61. The same principle would hold in an action for rent, as in the case under consideration.[1]

Petitioner has attempted to create a "due process" issue for the purpose of requesting review by this Court. This at best is an illusory issue in that the question raised by the petitioner is not one of constitutional due

---

[1] Petitioner cites exceptions to this general rule, all of which involve questions of state law and none of which apply in this case. A challenge is permitted if a dispute arises as to the landlord's title and the tenant first surrenders possession of the land, *Stover* v. *Davis*, 57 W.Va. 196, 49 S.E. 1023 (1905), or if, at the expiration of the lease term, the tenant disclaims the landlord's title and notifies the landlord that events have proven that title is properly in himself or a third person. *Voss* v. *King*, 33 W.Va. 236, 10 S.E. 402 (1889). None of these exceptions apply in this case. The petitioner herein maintained possession throughout the proceedings, gave no legal notice that he was disclaiming the City's title and did not formally raise the question of title until the City filed suit for unpaid rent. In addition, the City has continuously claimed ownership of the subject property and has submitted bills for rent to the petitioner every month to the present time. Furthermore, the petitioner has not been threatened in a suit of paramount title to the subject property constituting the equivalent to an eviction. In short, the title dispute was never an issue formally or legally raised during the time of the tenancy which is the subject of this action for rent.

process but rather a matter of state law as to what issues are involved in a landlord's action for unpaid rent and what evidence is admissible on these issues. Inasmuch as the question of title was irrelevant to this action for rent, evidence on title had no bearing on the tenant's obligation to pay rent under the lease agreement and was properly not admitted. Moreover, the Supreme Court of the United States has held that failure of a state court to admit irrelevant evidence is not open to constitutional objection. *Chaplinsky* v. *State of New Hampshire*, 315 U.S. 568 (1942). In addition, it has been held that denial of permission to introduce testimony before a federal agency did not deprive the party of his constitutional rights. *Glen Falls Portland Cement Co.* v. *Delaware & Hudson Co.*, 66 F.2d 490 (Second Cir. 1933), cert. den. 290 U.S. 697.

In summary, the law in Virginia, as cited above and as conceded by the petitioner, is settled that a tenant is estopped from trying his landlord's title in an action for posssesion or for unpaid rent. Basing his decision on this well-settled doctrine, and on the finding that none of the exceptions to this rule applied, the trial court rightfully ruled to exclude evidence proffered by the petitioner bearing on title to the subject property, and the Supreme Court of Virginia rightfully upheld the trial court's ruling by denying the petitioner's writ of error.

It is further contended by the petitioner that it was against public policy for the trial court to disallow evidence on the City's title in the action for rent. The petitioner cites *Ellis* v. *Sutton*, 126 Miss. 102, 88 So. 519 (1921), and *City of Greenville* v. *White*, 194 Miss. 145, 11 So.2d 818 (1945) for the principle that when title is in the government it is against public policy to forbid the tenant to dispute his landlord's title. These cases are easily distinguishable and are not at all per-

tinent to the petition herein. In *Ellis*, a state court case dating back to 1921: 1) the issue was a dispute over title to land, not rent, 2) the case was decided as a matter of Mississippi public policy, not federal constitutional law and 3) the decision was applicable solely to the State of Mississippi. In the present case: 1) the basic issues involved a dispute over rent by virtue of a lease between the City and petitioner, not title to land, 2) the question as to the relevance of evidence was decided as a matter of state law and 3) Virginia state law governed. In *Greenville*, the Mississippi court cited the *Ellis* case for the principle that public policy should allow the tenant to question a landlord's title when the landlord is the government. But here too, there is no similarity to the petition herein. A state court, again in the State of Mississippi, was called upon to construe the terms of a lease with respect to ownership of crops cultivated on property purchased by the City of Greenville from one White and then leased to the United States Government. The principles of those cases have no application to the present case or to petitioner's contentions under the Fourteenth Amendment to the United States Constitution. Indeed, it has been held in the State of Washington that in an action by a landlord against his tenant for possession of land, it is no defense that the land is tide land, the title to which was in the United States. *Hall & Paulson Furniture Co.* v. *Wilbur*, 4 Wash. 644, 30 P. 655 (1892). "The doctrine that a tenant is estopped to deny his landlord's title is founded on public policy, in that it tends to encourage honesty and good faith between landlord and tenant." 11 Michie's Jurisprudence, *Landlord and Tenant*, § 62.

In the present case, the petitioner is attempting to avoid liability to its landlord for rent by adopting the claim by the United States that the Federal Government owns lands along the entire Alexandria waterfront

over against all the titleholders of record, which as noted previously, is now being litigated in the federal courts. That litigation points out the inappropriateness of a state court trying title in each and every landlord and tenant dispute along the waterfront. If the state courts allowed title to be tried in these disputes, both the federal and state courts would be trying title to the same property simultaneously. To further confuse the issues most of these cases, including the instant case, would not include the United States as a party. Even if petitioner had presented a federal issue, which it has not, the pendency of such complex and protracted litigation in the federal courts highlights the inappropriateness of granting a writ of certiorari in this case.

II.

THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR THIS COURT IN ITS SOUND DISCRETION UNDER RULE 19, SUPREME COURT RULES, TO REVIEW ON WRIT OF CERTIORARI THE DECISION OF THE SUPREME COURT OF VIRGINIA TO REFUSE THE PETITIONER'S WRIT OF ERROR.

Rule 19(a), Supreme Court Rules, in setting forth the character of reasons which will be considered by this Court in deciding, as a matter of sound judicial discretion, whether to grant review on writ of certiorari, provides that a writ may be granted where a state court has decided a "federal question of substance." In the case under consideration, the state court did not decide a "federal question of substance", or indeed any federal question at all, when it ruled that under Virginia law the tenant in this case was estopped from trying his landlord's title and excluded evidence on title in the City's action for rent. If this were to be regarded as a federal question then every ruling of a state court excluding irrelevant evidence and every ruling on whether

certain evidence is or is not irrelevant could be relitigated in the Supreme Court of the United States. This case is a matter of state law and encompasses no issues of general importance or of federal interest.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

CYRIL D. CALLEY
Deputy City Attorney
City of Alexandria, Virginia

J. HOWARD MIDDLETON, JR.
Assistant City Attorney
City of Alexandria, Virginia
320 King Street, Suite 200
Alexandria, Virginia 22314
(703) 750-6287

Attorneys for Respondent

APPENDIX A

VIRGINIA:

IN THE CIRCUIT COURT OF THE
CITY OF ALEXANDRIA

At Law No. 2449

CITY OF ALEXANDRIA, a municipal corporation of Virginia
Plaintiff

v.

OLD TOWN YACHT BASIN, INC.
Defendant

ORDER

THIS CAUSE came on to be heard on the 14th day of August 1974, upon the defendant's Motion to Vacate Judgment of this Court entered on July 10, 1974, upon the staying of said judgment by this Court on July 24, 1974 until said Motion to Vacate Judgment could be heard, upon the continuance of the hearing on said Motion to August 14, 1974, and was argued by counsel.

AND IT APPEARING TO THE COURT that the defendant's Motion to Vacate Judgment should be denied for reasons previously stated by the court; therefore, it is hereby

ADJUDGED, ORDERED and DECREED that the defendant's Motion to Vacate Judgment is hereby denied and the judgment of this Court entered on July 10, 1974 is affirmed.

AND IT IS SO ORDERED this 11th day of September, 1974.

/s/ Donald H. Kent
Judge

SEEN:

/s/ J. Howard Middleton, Jr.
J. HOWARD MIDDLETON, JR.
Assistant City Attorney
Counsel for Plaintiff

SEEN AND EXCEPTION HEREBY NOTED:

LUTZ & KAVALJIAN

/s/ Herman W. Lutz
HERMAN W. LUTZ
Counsel for Defendant

[SEAL]

A COPY TESTE:

ALVIN W. FRINKS
Clerk

BY: /s/ Jo Ann Wells
Deputy Clerk

Supreme Court, U. S.
FILED
SEP 18 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1548

OLD TOWN YACHT BASIN, INC.,

Petitioner,

v.

CITY OF ALEXANDRIA,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

DAVID ROSS ROSENFELD
118 South Royal Street
P.O. Box 96
Alexandria, Virginia 22313
(703) 548-2600
Attorney for Petitioner.

September 18, 1975

Washington, D.C. • THIEL PRESS • (202) 638-4521

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1548

OLD TOWN YACHT BASIN, INC.,

Petitioner,

v.

CITY OF ALEXANDRIA,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Pursuant to Rule 24, Rules of the Supreme Court of the United States, as amended, and because petitioner believes that respondent's Statement of the Case misstates certain facts, and further, in light of new and critical facts which have been discovered, petitioner has determined that the filing of this Reply is essential.

In its Statement of the Case, respondent, adopting the language of the trial court, characterizes itself as "title holder." (Resp. Brief, p. 2) The use of this phrase, especially in light of the trial court's refusal to permit petitioner to raise any question regarding respondent's title, is misleading and assumes the truth of the very fact which should have been in issue below, and which forms the focal point of petitioner's constitutional claim.

As evidenced by the record (Pet. App. 4a), the United States Department of the Interior, by letter dated May 17, 1973, has asserted paramount title to the land in question and the federal government's claim of absolute right to evict without "prior notice." On one hand, respondent suggests that, as held by the trial court, such evidence would be irrelevant and "not open to constitutional objection." (Resp. Brief, p. 6) Yet, as argued by petitioner, and as pointed out by respondent, threat of paramount title would, under some circumstances, constitute sufficient grounds to justify and even require an examination of the landlord's title as a matter of public policy. It is, therefore, certainly not inappropriate for petitioner to argue that when the federal government claims paramount title and the right to evict at will, the refusal of the trial court to permit the introduction of such evidence can certainly result in a denial of due process of law.

Respondent further and incorrectly represents that petitioner paid rent through December, 1971, that petitioner, "[s]uddenly in January, 1972" stopped paying rent, and that the parties had entered into good faith negotiations for new lease terms which failed. In its final Order, the trial court, however, clearly held that there were no negotiations after June, 1968, and that petitioner paid rent only through November, 1971. (Pet.

App. 8a-9a) Furthermore, contrary to respondent's suggestion at page 2 of their Statement of the Case, rent was paid under the lease only through March, 1969. It is also a matter of record that respondent had more than ample notice of petitioner's protest and question regarding respondent's title to the land and its authority as landlord. In fact, the last two rent checks tendered by petitioner to respondent clearly indicated that payment was being made under protest. Had exploration of these matters been permitted below, the trial court could have found that such protest constituted "legal notice that [petitioner] was disclaiming the City's title" (Resp. Brief, p. 5, fn. 1) and that evidence disputing the landlord's title would be permissible. However, by foreclosing this avenue of proof, petitioner was deprived of the opportunity to establish the foundation for a completely appropriate contest of the landlord's title. This is the denial of due process of law which forms the basis for this Petition.

The Canons of Judicial Conduct for the State of Virginia specifically require that a judge

> "should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor, or that he is affected by his kinship, rank, position or influence of any party or other person." Canon 3(c)(1)

The rule recognizes the right of every litigant to have his case tried before an impartial judge and the constitutionally based due process requirement of a hearing before an impartial and disinterested tribunal. However, the rule also requires, as a concomitant of due process of law, the appearance of complete impartiality and a guarantee of the cold neutrality of an impartial judge.

Prior to initiation of the "rent" action below, respondent, the City of Alexandria, was named as a party defendant in litigation instituted to try title to all waterfront property. (Resp. Brief 3, fn. 1) Being named a party defendant, respondent retained the services of a local and prominent law firm to represent its interests. Those interests were clearly in opposition to the United States, since respondent also claimed title to the property in question, and likewise, inconsistent with those of petitioner who seeks to defeat respondent's title in the face of the paramount title of the United States.

In January, 1974, respondent, through its "City Attorney," initiated its "rent" action by filing a complaint in the Circuit Court for the City of Alexandria. However, prior to this filing, the pleadings were submitted for review and comment to the local and prominent law firm representing respondent's interests in the federal title litigation. On February 8, 1974, a partner of this same law firm was appointed to the Circuit Court bench, and on June 21, 1974, entered an Order awarding respondent judgment in this case. At no time during the course of the litigation below was petitioner ever made aware of the trial judge's former association with the law firm representing respondent's interests in similar litigation, nor did the trial judge ever advise counsel for petitioner of the interest and activity of his law firm in the instant case. See affidavit of Kathryn B. Lang and John Gager, attached.

Even a casual review of the facts as they now come to light, suggests a degree of relationship between the respondent and the trial judge sufficient to compel reconsideration of the entire matter prior to entry of any final Order in this case.

CONCLUSION

For these reasons, and those set forth in the original petition, a Writ of Certiorari should issue and the decision of the Supreme Court of Virginia should be reversed.

Respectfully submitted,

DAVID ROSS ROSENFELD
118 South Royal Street
Post Office Box 96
Alexandria, Virginia 22313
(703) 548-2600
Attorney for Petitioner.

ADDENDUM

AFFIDAVIT

I, Kathryn B. Lang, being duly sworn, say and depose that on or about June 5, 1975, in company with John Gager, did go to the office of David Ross Rosenfeld, Esq. in connection with reviewing papers regarding this Petition for Writ of Certiorari, and was shown papers on the letterhead of substantially as I recall, the Law firm of Thomas, Kent, Haddock and Sewell, the subject of which was a draft of pleadings and other things directly related to the instant suit.

As a result of the above, I prepared the attached memorandum, which is to be read as and made a part of this affidavit, and on the morning of June 6, 1975 gave the memorandum to my attorney Robert J. Skahan who took it into the judge's chambers immediately before trial in another matter scheduled before Judge Kent, and this resulted in that case being transferred and heard that day before Judge Wright.

/s/ Kathryn B. Lang

Kathryn B. Lang

COMMONWEALTH OF VIRGINIA

CITY OF ALEXANDRIA, To-wit:

Subscribed and sworn to before me, a Notary Public in for the City and State aforesaid, this 11th day of September, 1975.

/s/ Kathy S. Almquist

Notary Public

My commission expires: 2-14-78

[SEAL]

MEMORANDUM ATTACHED TO AFFIDAVIT OF KATHRYN B. LANG

836-1054

my Client insists that for the record you be asked to *Recuse* in this case. As it is, this case is already fraught with enough conflict of interest.

This Plaintiff has been a party in interest in at least three other cases in which you have, in her opinion, acted unjustly and/or without cause ruled adversely to her interest. She has recently learned that HADDOCK, SEWELL AND KENT actually prepared the whole case in Law 2449 against Old Town Yacht Basin, Inc. and received pay or hire therefor, and that you must have known this at the time you rejected Old Town Yacht Basin's suggestion made through Herman Lutz, Esq. that you recuse in that case but for lesser and more widely known reasons . . . which case Old Town Yacht Basin, Inc. is now appealing to the Supreme Court of the United States.

Note: Equity 11841
Law #2915

AFFIDAVIT

COMES NOW John Gager, who, having first been duly sworn under oath, deposes and says that during the course of preparation of the Petition for Writ of Certiorari in this case, and while at the offices of David Ross Rosenfeld, counsel for petitioner, he personally read certain documents directly related to the respondent's suit for rent, which documents bore the letterhead of the law firm referred to in the attached reply brief.

/s/ John Gager

John Gager

COMMONWEALTH OF VIRGINIA

CITY OF ALEXANDRIA, To-wit:

Subscribed and sworn to before me, a Notary Public in and for the City and State aforesaid, this 11th day of September, 1975.

/s/ Donald C. Wells, Jr.

Notary Public

My commission expires:
March 25, 1978.

[SEAL]

Supreme Court, U. S.
FILED
AUG 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Supreme Court, U. S.
FILED
OCT 2 1975
MICHAEL RODAK, JR., CLERK

No. 74-1548

OLD TOWN YACHT BASIN, INC.,
Petitioner,

v.

CITY OF ALEXANDRIA,
Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

CYRIL D. CALLEY
Deputy City Attorney
City of Alexandria, Virginia

J. HOWARD MIDDLETON, JR.
Assistant City Attorney
City of Alexandria, Virginia
320 King Street, Suite 200
Alexandria, Virginia 22314
(703) 750-6287

Attorneys for Respondent

October 2, 1975

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

TABLE OF CONTENTS

Page

STATEMENT IN RESPONSE TO PETITIONER'S REPLY BRIEF

I. Petitioner's Statements with Respect to Respondent's Statement of the Case are Immaterial to the Constitutional Issue Presented by the Petition for Writ of Certiorari 1

II. The Contentions and Allegations Concerning the Trial Judge's Participation in this Case should not be Considered Because this Issue was Not Raised in the Courts Below, and, in Any Event, are Unfounded and Based on False Statements in the Attached Affidavits 3

CONCLUSION 6

TABLE OF CITATIONS

Case:

Ellis v. *Dixon*, 349 U.S. 458 (1955), *reh. den.* 350 U.S. 855 3

Constitution, Regulations, Statutes, Rules:

United States Constitution, Fourteenth Amendment 2

Rule 24, Supreme Court Rules 1

TABLE OF CONTENTS OF APPENDIX

Order of the Circuit Court of the City of Alexandria, Virginia, Granting Respondent's Motion for Summary Judgment for Rent 1a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1548

OLD TOWN YACHT BASIN, INC.,
Petitioner,

v.

CITY OF ALEXANDRIA,
Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Pursuant to Rule 24, Rules of the Supreme Court of the United States, as amended, respondent is filing this Supplemental Brief in response to new contentions and serious allegations in petitioner's Reply.

STATEMENT IN RESPONSE TO PETITIONER'S REPLY BRIEF

I.

PETITIONER'S STATEMENTS WITH RESPECT TO RESPONDENT'S STATEMENT OF THE CASE ARE IMMATERIAL TO THE CONSTITUTIONAL ISSUE PRESENTED BY THE PETITION FOR A WRIT OF CERTIORARI.

Before discussing petitioner's new and serious allegations, brief comment should be made on statements in petitioner's Reply on page 2 continued through the

middle of page 3. Respondent submits that these statements are not material to the basic question presented in the petition herein which is whether the trial court violated the Fourteenth Amendment to the Constitution of the United States in ruling to exclude evidence on the issue of title in real estate for the reason that the tenant, petitioner herein, could not avoid its obligation to pay rent to its landlord, respondent herein, by setting up title in a third party, a general rule of landlord-tenant law followed in Virginia. (Resp. Brief, p. 4). As stated in respondent's Brief, the trial court's ruling is a matter of state law and nothing in the petition or in petitioner's Reply can create a question of general importance or of federal interest. (Resp. Brief, p. 8-9).[1]

---

[1] Certain misunderstandings should be clarified, however, with respect to respondent's Statement of the Case. Petitioner maintains that it paid rent only through November, 1971, rather than December, 1971, as represented in respondent's Brief (Pet. Reply, p. 2). At the trial, it had been agreed that November, 1971, was the last month for which petitioner had paid its rent to respondent. However, just prior to entry of the final order, it came to the attention of respondent that the final check for rent submitted by petitioner was for December, 1971, rather than November, 1971. Since this miscalculation affected only the amount of rent due and owing, rather than the legal issues in the case, counsel for respondent and petitioner agreed to note and initial on the final order a credit of one month's rent. The trial judge, in entering the final order, reprinted herein as Appendix A, consented to this agreement by counsel for both parties. Petitioner also states in its Reply that rent was paid under the lease only through March, 1969 (Pet. Reply, p. 3). The trial court held, however, that at the expiration of the original lease a month-to-month tenancy was created, and the record indicates that rent was paid pursuant to this arrangement into 1971.

II.

THE CONTENTIONS AND ALLEGATIONS CONCERNING THE TRIAL JUDGE'S PARTICIPATION IN THIS CASE SHOULD NOT BE CONSIDERED BECAUSE THIS ISSUE WAS NOT RAISED IN THE COURTS BELOW, AND, IN ANY EVENT, ARE UNFOUNDED AND BASED ON FALSE STATEMENTS IN THE ATTACHED AFFIDAVITS.

It has been held that a party cannot raise an issue in seeking certiorari that was not raised below. *Ellis* v. *Dixon*, 349 U.S. 458 (1955), *reh. den.* 350 U.S. 855. In light of this case respondent submits that the contentions and allegations in the second portion of petitioner's Reply on pages 3 and 4 should not be considered by this Court because they deal with an issue not heretofore raised in this case; namely, the issue of recusal of the trial judge.

In addition to the rule discussed above, we suggest that this case be decided on its merits and not extraneous matter. In fact, we would normally not respond to such matter. However, in this instance petitioner has made serious and false allegations which we cannot let stand unchallenged on the record, particularly as they are based on misleading statements in the Reply and factually untrue statements sworn to in affidavits attached to said Reply (Pet. Add. 1, 2 and 3). In its Reply, petitioner contends that the trial judge's former law firm was so involved in this case that he should have withdrawn prior to trial. Respondent submits that this is not so. The law firm referred to in the Reply served, for a time, as counsel to the respondent in the waterfront title litigation instituted by the United States Government. (Resp. Brief, p. 8). Prior to filing the instant case for unpaid rent, a member of said law firm reviewed the respondent's initial pleading for the sole purpose of determining whether it in any way

affected the title litigation in the federal courts. In addition, upon petitioner's filing a petition for removal to the United States District Court for the Eastern District of Virginia on March 4, 1974, a member of said law firm discussed with an assistant city attorney the city's response to said petition. The petition was dismissed and the case remanded to the state court on May 2, 1974. Other than these two reviews, the law firm had no interest in the instant case. Moreover, this law firm withdrew as counsel for the respondent in the title litigation for reasons wholly unrelated on July 26, 1974.

Furthermore, the trial judge, at a pre-trial conference in this case, informed counsel for both parties that his former law firm represented the respondent in the waterfront title litigation. At no time did any attorney for the petitioner ever request the trial judge to withdraw from this case. In addition, Judge Kent, while a member of said law firm, performed no work in either the waterfront title litigation or the instant case. The decision not to allow petitioner to litigate the title to the Alexandria waterfront in the instant case was made by Judge Wright at a pretrial hearing prior to the case being assigned to Judge Kent. This decision was in accord with a ruling of the Chief Judge in a related matter several months previous.

Even more serious than the unfounded implications in petitioner's Reply are the affidavits accompanying it. Respondent submits that it was impossible for one Kathryn B. Lang to have been shown papers relating to this case with the law firm's letterhead in the law offices of her attorney as she states in her affidavit (Pet. Add. 1). To the best of our knowledge and belief, there are no such papers. In addition, the memorandum attached to this affidavit (Pet. Add. 2) also contains false statements. The law firm referred to most definitely did not prepare this case for the re-

spondent or receive remuneration therefore; and, Herman Lutz, Esq. never suggested that the trial judge recuse in this case. And still further, Ms. Lang's other attorney mentioned in the affidavit never requested that this same trial judge withdraw from another wholly unrelated case as she states in the affidavit (Pet. Add. 1). Indeed, Judge Wright was scheduled for that case at the outset. As to the affidavit by one John Gager (Pet. Add. 3), this too is false. Again, to the best of our knowledge and belief, there are no papers with the firm's letterhead related to respondent's suit for rent.

The fact that so many false statements have been sworn to in affidavits and submitted by an attorney to the Supreme Court of the United States is a matter of grave concern. In any event, however, these matters are extraneous to the basic issues before this Court and petitioner has not provided sufficient argument to compel reconsideration of the entire case.

CONCLUSION

For these reasons and for the reasons stated in respondent's Brief in Opposition, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

/s/ Cyril D. Calley
CYRIL D. CALLEY
Deputy City Attorney
City of Alexandria, Virginia

/s/ J. Howard Middleton, Jr.
J. HOWARD MIDDLETON, JR.
Assistant City Attorney
City of Alexandria, Virginia
320 King Street, Suite 200
Alexandria, Virginia 22314
(703) 750-6287

Attorneys for Respondent

APPENDIX A

VIRGINIA:

IN THE CIRCUIT COURT OF THE
CITY OF ALEXANDRIA

At Law No. 2449

CITY OF ALEXANDRIA, a municipal
corporation of Virginia,
Plaintiff,

v.

OLD TOWN YACHT BASIN, INC.,
Defendant.

ORDER

THIS CAUSE came on to be heard on the 21st day of June 1974, upon the Motion for Judgment for Rent with Exhibits filed by plaintiff herein, upon the Grounds of Defense, Amended Grounds of Defense and Counterclaim filed by the defendant herein, upon the Answer to Counterclaim filed by plaintiff, upon a Request for Admission of Facts and Genuineness of Documents by plaintiff, upon the defendant's Response to said Request, upon a Request for Admission of Facts and Genuineness of Documents by defendant, upon the plaintiff's oral response in open Court to said Request, upon the Motion for Summary Judgment by plaintiff, upon the stipulations by plaintiff and defendant, and was argued by counsel.

AND IT APPEARING TO THE COURT that the lease dated March 29, 1956, and recorded in Deed Book 430 at page 27 among the land records of the City of Alexandria, Virginia, entered into by the defendant's predecessors and the plaintiff, and assigned to the defendant with consent to the assignment by the plaintiff,

expired on March 29, 1966; that negotiations toward a new rental agreement continued between plaintiff and defendant through June 1968; and that payments of rent in the amount of ONE DOLLAR ($1.00) per year were made thereafter on April 1, 1966, April 1, 1967, and May 13, 1968, and that such payments did not create an extension or renewal of the lease on a year to year basis;

AND IT FURTHER APPEARING TO THE COURT that on July 1, 1968, the plaintiff and defendant agreed to a tenancy from month to month at a rental in the sum of THREE HUNDRED DOLLARS ($300.00) per month by virtue of a letter dated June 17, 1968, marked plaintiff's Exhibit B and defendant's payment of the rent demanded commencing on July 1, 1968, and continuing through November 1971, all rent being current through November 1971; and that rent is due and owing the City for defendant's use and occupancy of the City owned land for December 1971 through January 1974, in the sum total of SEVEN THOUSAND EIGHT HUNDRED DOLLARS ($7,800.00);

AND IT FURTHER APPEARING TO THE COURT that the defendant Tenant is estopped to deny the plaintiff Landlord's title unless he claims title in himself, which the defendant has not done;

AND IT FURTHER APPEARING TO THE COURT that there is no question of fact to be determined by the jury; therefore, it is hereby

ADJUDGED, ORDERED and DECREED that the plaintiff's Motion for Summary Judgment for Rent in the sum total of SEVEN THOUSAND EIGHT HUNDRED DOLLARS ($7,800.00) is granted and the defendant's Counterclaim is dismissed. The court hereby notes that plaintiff and defendant agree that the sum of $300 is to be credited to the defendant's account.

AND IT IS SO ORDERED this 10th day of July 1974.

/s/ Donald Kent
Judge

Entered July 10, 1974, Common Law Bk. 14, page 169, J L D 23, page 93.

SEEN:

/s/ J. Howard Middleton, Jr.
J. HOWARD MIDDLETON, JR.
Assistant City Attorney
Counsel for Plaintiff

SEEN AND EXCEPTION HEREBY NOTED:

LUTZ & KAVALJIAN

/s/ Herman W. Lutz
HERMAN W. LUTZ
Counsel for Defendant

A COPY TESTE:

ALVIN W. FRINKS
Clerk

By: /s/ Alvin W. Frinks
Deputy Clerk

Supreme Court, U. S.
FILED
OCT 31 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1548

OLD TOWN YACHT BASIN, INC.,

Petitioner,

v.

CITY OF ALEXANDRIA,

Respondent.

PETITION FOR REHEARING

KATHRYN B. LANG
Secretary-Treasurer
Old Town Yacht Basin, Inc.
500 South Union Street
Alexandria, Virginia 22314
(703) 836-1054
Counsel for Petitioner Pro Se.

October 31, 1975

Washington, D.C. • THIEL PRESS • (202) 638-4521

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1548

OLD TOWN YACHT BASIN, INC.,

Petitioner,

v.

CITY OF ALEXANDRIA,

Respondent.

PETITION FOR REHEARING

Pursuant to Rule 58, Rules of the Supreme Court of the United States, as amended, and guided by the exemplary case *Scribner-Schroth Co. v. Cleveland Trust Co.*, 305 U.S. 47,50). Petitioner files this brief in order to show to the Court that Petitioner had exhausted every means to obtain an impartial Trial and to show that because in the State of Virginia such a tremendous effort had been made in all levels of the government to secure for the local governmental authority, in whatever way

they could, title to the Potomac River waterfront in the Alexandria area; and to show that neither in the local Court to which this defendant was confined, nor in the State Supreme Court, could a fair and impartial hearing be had.

The evidence as to the size of this effort can be demonstrated by the fact that, in the past four years, at least four Bills were introduced into Congress by the U.S. Congressmen from the appropriate District, To Wit: H.R. 19842, 91st Congress, 2nd session, H.R. 14869, 92nd Congress, 2nd Session, H.R. 8896, 93d Congress, 1st Session, H.R. 14043, 93d Congress, 2nd Session.

There is presently underway a large effort to have Congressman herbert Harris, 8th District, introduce yet a fifth Bill of similar character.

The previous Bills all failed to pass muster because they sought to give to the Virginia governmental authority absolute powers over waterfront lands belonging to the people of the United States, so that once control passed to the local authority, exemptions in the Bills would remove the lands and waters from the jurisdiction of the U.S. Corps of Engineers, the U.S. Department of Interior, and any other governmental agencies which might have ordinarily a voice and effective influence in directing the use and development of the historic riverfront lands.

Petitioner being but a relatively insignificant factor in the overall strategies being employed, seeks to show unto the Court, that it would not under these circumstances be dealt with fairly. The concentration of power within the State seeking to take over the public lands was, and is, so overwhelming as to preclude Petitioner's right to due process and fair hearing.

ADDENDUM

Attached hereto as an addendum are:

1. Petitioner's copies of legal documents marked Exhibits A, B, and C, prepared and supposedly filed by the then Trial Attorney in the case.

2. Copy of Respondent's Supplemental Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of Virginia, dated October 2, 1975, marked Exhibit D.

3. Copy of Petitioner's letter to David Ross Rosenfeld, Esq. dated September 2, 1975, marked Exhibit E.

4. Copy of Petitioner's letter to David Ross Rosenfeld, Esq. dated October 17, 1975, marked Exhibit F.

5. Letter of David Ross Rosenfeld, Esq., to Petitioner, dated October 20, 1975, marked Exhibit G.

6. Copy of letter from David Rosenfeld, Esq. to J. Howard Middleton, Jr., Esq., dated October 23, 1975, marked Exhibit H.

7. Affidavit of John C. Gager dated October 29, 1975, marked Exhibit I.

ARGUMENT

Exhibit D is attached hereto because of the uncertainty as to whether this Brief was considered by the Court, there being suggestion that it was not timely filed, or possibly not filed at all.

See Exhibit G, wherein our attorney inaccurately advises that the Petition was denied on October 1, inaccurately suggests that Petitioner is aware that he has been called worse things by clients. He inaccurately concludes that Petitioner has retained other counsel

when, what actually happened was that Mr. Miller volunteered to assist and was supposedly a longstanding friend of Mr. Rosenfeld's, and did actually come again to Petitioner on October 20, saying he had just come from Mr. Rosenfeld's office after conferring with him about this case.

It is clear from this letter and the series of letters related to Mr. Rosenfeld, that he has violated the canons which require him to be truthful to his client, to the Court, and to the adversary.

Petitioner however recognizes the seriousness of the allegations made by it and referred to at the beginning of Exhibit D, and deems it necessary to prove the truth and accuracy of its allegations, and the inaccuracy of Respondent's allegations. Also, because Petitioner has been given no choice, there is no forum but this in which Petitioner can fairly raise as a due process issue the question of the Trial Judge having been a member of the law firm which worked on the very complaint against Petitioner on which he shortly thereafter adversely ruled.

While under the present circumstances the specific evidence which brought this fact to Petitioner's attention may vanish, still the admission of the actual occurrence stands in Exhibit D.

The probability that such a chain of events could occur in any other jurisdiction is very small, and is a reality in the particular jurisdiction where the case was brought only because of the overriding importance of the strategies which motivate the local governmental authority in its efforts to obtain absolute custody, control and ownership of the Alexandria Virginia waterfront by whatever means.

As the record shows, Petitioner has sought and been denied access to any judicial Trial forum other than the Circuit Court for the City of Alexandria, and it is manifest that Petitioner could not obtain a fair trial in that forum.

One thing that was truthfully stated in Exhibit D was the fact that Judge Wiley Wright, before withdrawing from the case (without any suggestion on Petitioner's part) because of possible prejudice, did say that he would not look into the title question because the chief Judge had ruled on that in another case. Judge Kent also made the same statement, even though he knew the circumstances in the two cases were quite different, and that the related case referred to in Exhibit D, namely *Southern Railway Co. v. Old Town Yacht Basin, Inc.*, Law #10223, was decided before steps were taken by the Federal Government which resulted in the issuance of the letter of May 17, 1973 from Assistant Secretary of the Interior Nathaniel Reed. This letter is copied in the appendix and, in Petitioner's view, amounts to a permit under which Petitioner claims under the paramount title holder, the United States Department of Interior.

The denial of due process under the circumstances outlined in the argument should be compelling enough to warrant further consideration by the Court.

Respectfully submitted,

KATHRYN B. LANG
Secretary-Treasurer
Old Town Yacht Basin, Inc.
500 South Union Street
Alexandria, Virginia 22314
(703) 836-1054
Counsel for Petitioner Pro Se.

October 31, 1975

ADDENDUM

EXHIBIT A

VIRGINIA:

IN THE CIRCUIT COURT FOR THE
CITY OF ALEXANDRIA

CITY OF ALEXANDRIA, a municipal corporation of Virginia,	:	
Plaintiff	:	
vs.		AT LAW NO. 2449
OLD TOWN YACHT BASIN, INC.,	:	
Defendant	:	

STATE OF VIRGINIA:

CITY OF ALEXANDRIA:

Personally appeared before me, the undersigned Notary in the State and City aforesaid, Kathryn B. Lang of the Old Town Yacht Basin, Inc., and made oath that, in their opinion, a fair and impartial trial, wherein the City of Alexandria is a party, could not be had in the City of Alexandria.

OLD TOWN YACHT BASIN, INC.

BY: /s/Kathryn B. Lang
Secretary-Treasurer

Subscribed and sworn to before me this __ day of June, 1974. My commission expires:

Notary Public

EXHIBIT B

VIRGINIA:

IN THE CIRCUIT COURT FOR THE
CITY OF ALEXANDRIA

CITY OF ALEXANDRIA, a municipal corporation of Virginia,	:	
Plaintiff	:	
vs.		AT LAW NO. 2449
OLD TOWN YACHT BASIN, INC.,	:	
Defendant	:	

NOTICE

Notice is hereby given that on the ____ day of June, 1974, at 10:00 A.M. or as soon thereafter as the matter can be heard, the Defendant will move the Circuit Court of the City of Alexandria at the Court House thereof for an order transferring said cause from the Circuit Court of the City of Alexandria to the Circuit Court for Frederick or Warren County on the ground that the defendant has reason to believe that an impartial trial cannot be had in the City of Alexandria. Further that the City is a party to this action, and as a further grounds, this Court has an unappealed ruling prejudicial to the Defendant.

Said Motion will be made by and based upon this Notice, and the affidavit of the Defendant, a copy of which is served herewith and upon the pleadings, papers, records and files in this action.

OLD TOWN YACHT BASIN, INC.

BY: _____

LUTZ & KAVALJIAN
By:
Herman W. Lutz
Counsel for Defendant
109 S. Fairfax Street
Alexandria, Virginia

I hereby certify that a copy of the above, has been delivered to Lynn B. Sasso, 320 King Street, Suite 200, Alexandria, Virginia, Counsel for Plaintiff, this __ day of June, 1974.

Herman W. Lutz

EXHIBIT C

VIRGINIA:

IN THE CIRCUIT COURT FOR THE
CITY OF ALEXANDRIA

CITY OF ALEXANDRIA, a municipal corporation of Virginia,	:	
Plaintiff	:	
vs.		AT LAW NO. 2449
OLD TOWN YACHT BASIN, INC.,	:	
Defendant	:	

BLEED THROUGH

MOTION FOR CHANGE OF VENUE

COMES now the Defendant, OLD TOWN YACHT BASIN, INC., and moves this Court for a change of venue on the basis that an impartial trial would be impossible in that one of the parties to this action is the City of Alexandria.

OLD TOWN YACHT BASIN, INC.

BY: _____

LUTZ & KAVALJIAN
By:
Herman W. Lutz
109 S. Fairfax Street
Alexandria, Virginia
Counsel for Defendant

I hereby certify that a copy of the above, has been delivered to Lynn B. Sasso, 320 King Street, Suite 200, Alexandria, Virginia, Counsel for Plaintiff, this __ day of June, 1974.

Herman W. Lutz

EXHIBIT D

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1548

OLD TOWN YACHT BASIN, INC.,

Petitioner,

v.

CITY OF ALEXANDRIA,

Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BLEED THROUGH

(i)

TABLE OF CONTENTS

Page

STATEMENT IN RESPONSE TO PETITIONER'S REPLY BRIEF

I. Petitioner's Statements with Respect to Respondent's Statement of the Case are Immaterial to the Constitutional Issue Presented by the Petition for Writ of Certiorari .....

II. The Contentions and Allegations Concerning the Trial Judge's Participation in this Case should not be Considered Because this Issue was not Raised in the Courts Below, and, in Any Event, are Unfounded and Based on False Statements in the Attached Affidavits .....

CONCLUSION .....

TABLE OF CITATIONS

Case:

Ellis v. Dixon, 349 U.S. 458 (1955), reh. den. 350 U.S. 855 .....

Constitution, Regulations, Statutes, Rules:

United States Constitution, Fourteenth Amendment ....

Rule 24, Supreme Court Rules .....

TABLE OF CONTENTS OF APPENDIX

Order of the Circuit Court of the City of Alexandria, Virginia, Granting Respondent's Motion for Summary Judgment for Rent .....

Pursuant to Rule 24, Rules of the Supreme Court of the United States, as amended, respondent is filing this Supplemental Brief in response to new contentions and serious allegations in petitioner's Reply.

STATEMENT IN RESPONSE TO PETITIONER'S REPLY BRIEF

I.

PETITIONER'S STATEMENTS WITH RESPECT TO RESPONDENT'S STATEMENT OF THE CASE ARE IMMATERIAL TO THE CONSTITUTIONAL ISSUE PRESENTED BY THE PETITIONER FOR WRIT OF CERTIORARI.

Before discussing petitioner's new and serious allegations, brief comment should be made on statements in petitioner's Reply on page 2 continued through the middle of page 3. Respondent submits that these statements are not material to the basic question presented in the petition herein which is whether the trial court violated the Fourteenth Amendment to the Constitution of the United States in ruling to exclude evidence on the issue of title in real estate for the reason that the tenant, petitioner herein, could not avoid its obligation to pay rent to its landlord, respondent herein, by setting up title in a third party, a general rule of landlord-tenant law followed in Virginia. (Resp. Brief, p. 4). As stated in respondent's Brief, the trial court's ruling is a matter of state law and nothing in the petition or in petitioner's Reply can create a question of general importance or of federal interest. (Resp. Brief, p. 8-9).[1]

---

[1]Certain misunderstandings should be clarified, however, with respect to respondent's Statement of the Case. Petitioner main-

[footnote continued]

BLEED THROUGH

II.

THE CONTENTIONS AND ALLEGATIONS CONCERNING THE TRIAL JUDGE'S PARTICIPATION IN THIS CASE SHOULD NOT BE CONSIDERED BECAUSE THIS ISSUE WAS NOT RAISED IN THE COURTS BELOW, AND, IN ANY EVENT, ARE UNFOUNDED AND BASED ON FALSE STATEMENTS IN THE ATTACHED AFFIDAVITS.

It has been held that a party cannot raise an issue in seeking certiorari that was not raised below. *Ellis v. Dixon*, 349 U.S. 458 (1955), *reh. den.* 350 U.S. 855. In light of this case respondent submits that the contentions and allegations in the second portion of petitioner's Reply on pages 3 and 4 should not be considered by this Court because they deal with an issue not heretofore raised in this case; namely, the issue of recusal of the trial judge.

---

tains that it paid rent only through November, 1971, rather than December, 1971, as represented in respondent's Brief (Pet. Reply, p. 2). At the trial, it had been agreed that November, 1971, was the last month for which petitioner had paid its rent to respondent. However, just prior to entry of the final order, it came to the attention of respondent that the final check for rent submitted by petitioner was for December, 1971, rather than November, 1971. Since this miscalculation affected only the amount of rent due and owing, rather than the legal issues in the case, counsel for respondent and petitioner agreed to note and initial on the final order a credit of one month's rent. The trial judge, in entering the final order, reprinted herein as Appendix A, consented to this agreement by counsel for both parties. Petitioner also states in its Reply that rent was paid under the lease only through March, 1969 (Pet. Reply, p. 3). The trial court held, however, that at the expiration of the original lease a month-to-month tenancy was created, and the record indicates that rent was paid pursuant to this arrangement into 1971.

In addition to the rule discussed above, we suggest that this case be decided on its merits and not extraneous matter. In fact, we would normally not respond to such matter. However, in this instance petitioner has made serious and false allegations which we cannot let stand unchallenged on the record, particularly as they are based on misleading statements in the Reply and factually untrue statements sworn to in affidavits attached to said Reply (Pet. Add. 1, 2 and 3). In its Reply, petitioner contends that the trial judge's former law firm was so involved in this case that he should have withdrawn prior to trial. Respondent submits that this is not so. The law firm referred to in the Reply served, for a time, as counsel to the respondent in the waterfront title litigation instituted by the United States Government. (Resp. Brief, p. 8). Prior to filing the instant case for unpaid rent, a member of said law firm reviewed the respondent's initial pleading for the sole purpose of determining whether it in any way affected the title litigation in the federal courts. In addition, upon petitioner's filing a petition for removal to the United States District Court for the Eastern District of Virginia on March 4, 1974, a member of said law firm discussed with an assistant city attorney the city's response to said petition. The petition was dismissed and the case remanded to the state court on May 2, 1974. Other than these two reviews, the law firm had no interest in the instant case. Moreover, this law firm withdrew as counsel for the respondent in the title litigation for reasons wholly unrelated on July 26, 1974.

Furthermore, the trial judge, at a pre-trial conference in this case, informed counsel for both parties that his former law firm represented the respondent in the waterfront title litigation. At no time did any attorney

D THROUGH

for the petitioner ever request the trial judge to withdraw from this case. In addition, Judge Kent, while a member of said law firm, performed no work in either the waterfront title litigation or the instant case. The decision not to allow petitioner to litigate the title to the Alexandria waterfront in the instant case was made by Judge Wright at a pretrial hearing prior to the case being assigned to Judge Kent. This decision was in accord with a ruling of the Chief Judge in a related matter several months previous.

Even more serious than the unfounded implications in petitioner's. Reply are the affidavits accompanying it. Respondent submits that it was impossible for one Kathryn B. Lang to have been shown papers relating to this case with the law firm's letterhead in the law offices of her attorney as she states in her affidavit (Pet. Add. 1). To the best of our knowledge and belief, there are no such papers. In addition, the memorandum attached to this affidavit (Pet. Add. 2) also contains false statements. The law firm referred to most definitely did not prepare this case for the respondent or receive remuneration therefore; and, Herman Lutz, Esq. never suggested that the trial judge recuse in this case. And still further, Ms. Lang's other attorney mentioned in the affidavit never requested that this same trial judge withdraw from another wholly unrelated case as she states in the affidavit (Pet. Add. 1). Indeed, Judge Wright was scheduled for that case at the outset. As to the affidavit by one John Gager (Pet. Add. 3), this too is false. Again, to the best of our knowledge and belief, there are no papers with the firm's letterhead related to respondent's suit for rent.

The fact that so many false statements have been sworn to in affidavits and submitted by an attorney to

the Supreme Court of the United States is a matter of grave concern. In any event, however, these matters are extraneous to the basic issues before this Court and petitioner has not provided sufficient argument to compel reconsideration of the entire case.

CONCLUSION

For these reasons and for the reasons stated in respondent's Brief in Opposition, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

/s/Cyril D. Calley
CYRIL D. CALLEY
Deputy City Attorney
City of Alexandria, Virginia

/s/J. Howard Middleton, Jr.
J. HOWARD MIDDLETON, JR.
Assistant City Attorney
City of Alexandria, Virginia
320 King Street, Suite 200
Alexandria, Virginia 22314
(703) 750-6287

Attorneys for Respondents

APPENDIX A

VIRGINIA:

IN THE CIRCUIT COURT FOR THE
CITY OF ALEXANDRIA

CITY OF ALEXANDRIA, a municipal corporation of Virginia,	:	
Plaintiff	:	AT LAW NO. 2449
vs.		
OLD TOWN YACHT BASIN, INC.,	:	
Defendant	:	

ORDER

THIS CAUSE came on to be heard on the 21st day of June 1974, upon the Motion for Judgment for Rent with Exhibits filed by plaintiff herein, upon the Grounds of Defense, Amended Grounds of Defense and Counterclaim filed by the defendant herein, upon the Answer to Counterclaim filed by plaintiff, upon a Request for Admission of Facts and Genuineness of Documents by plaintiff, upon the defendant's Response to said Request, upon a Request for Admission of Facts and Genuineness of Documents by defendant, upon the plaintiff's oral response in open Court to said Request, upon the Motion for Summary Judgment by plaintiff, upon the stipulations by plaintiff and defendant, and was argued by counsel.

AND IT APPEARING TO THE COURT that the lease dated March 29, 1956, and recorded in Deed Book 430 at page 27 among the land records of the City of Alexandria, Virginia, entered into by the defendant's predecessors and the plaintiff, and assigned to the defendant with consent to the assignment by the plaintiff, expired on March 29, 1966; that negotiations toward a new rental agreement continued between plaintiff and defendant through June 1968; and that payments of rent in the amount of ONE DOLLAR ($1.00) per year were made thereafter on April 1, 1966, April 1, 1967, and May 13, 1968, and that such payments did not create an extension or renewal of the lease on a year to year basis;

AND IT FURTHER APPEARING TO THE COURT that on July 1, 1968, the plaintiff and defendant agreed to a tenancy from month to month at a rental in the sum of THREE HUNDRED DOLLARS ($300.00) per month by virtue of a letter dated June 17, 1968, marked plaintiff's Exhibit B and defendant's payment of the rent demanded commencing on July 1, 1968, and continuing through November 1971, all rent being current through November 1971; and that rent is due and owing the City for defendant's use and occupancy of the City owned land for December 1971 through January 1974, in the sum total of SEVEN THOUSAND EIGHT HUNDRED DOLLARS ($7,800.00);

AND IT FURTHER APPEARING TO THE COURT that the defendant Tenant is estopped to deny the plaintiff Landlord's title unless he claims title in himself, which the defendant has not done;

AND IT FURTHER APPEARING TO THE COURT that there is no question of fact to be determined by the jury; therefore, it is hereby

ED THROUGH

ADJUDGED, ORDERED and DECREED that the plaintiff's Motion for Summary Judgment for Rent in the sum total of SEVEN THOUSAND EIGHT HUNDRED DOLLARS ($7,800.00) is granted and the defendant's Counterclaim is dismissed. The Court hereby notes that plaintiff and defendant agree that the sum of $300 is to be credited to the defendant's account.

AND IT IS SO ORDERED this 10th day of July 1974.

/s/[Illegible]
JUDGE

SEEN:

/s/J. Howard Middleton, Jr.
J. Howard Middleton, Jr.
Assistant City Attorney
Counsel for Plaintiff

SEEN AND EXCEPTION HEREBY NOTED:
LUTZ & KAVALJIAN

/s/ Herman W. Lutz
Herman W. Lutz
Counsel for Defendant

EXHIBIT E

Old Town Yacht Basin, Inc.

P.O. BOX 1012 • 500 SOUTH UNION STREET • ALEXANDRIA, VIRGINIA 22313

836-1054

September 2, 1975

CERTIFIED MAIL #150313
Return Receipt Requested

David Rose Rosenfeld, Esq.
118 S. Royal Street
Alexandria, Va. 22314

Dear Mr. Rosenfeld:

You have come back onto the scene just long enough to send us papers related to your services, which will require some further discussion and consideration, and I will only highlight one important point now. You may wish to review the Virginia case in Volume 214 at page 448 so that you will be guided by an understanding of what we consider a retainer to be in the light of this case. We can only conclude from your absence on Thursday, when you promised to be on hand, that you have lost interest in our legal affairs.

There is, however, the matter which you began for Old Town Yacht Basin which we treat as a contractual obligation and it becomes necessary for me to tell you in no uncertain terms what you must yet do to satisfy the contract and earn the balance of the fee. We shall treat any failure to do gracefully what is necessary, as conduct unbecoming a conscientious and dedicated lawyer and that is: Prepare a draft of a reply brief in the U.S.

ED THROUGH

Supreme Court so that it can be timely printed and filed. This will cover the salient matters we have heretofore taken up with you, as well as submitting the newly found evidence you showed us recently, as part of the record; namely, the letterhead and contents which shows beyond a reasonable doubt that Haddock, Sewell & Kent prepared the complaint against Old Town Yacht Basin, Inc., and the very obvious argument that a conspiracy developed to place this matter before Judge Kent as soon as he became active as a Judge so that he could rule adversely as he did, all contrary to law, the canon of ethics, and violative of due process.

I would suggest that upon receipt of this letter, you immediately stir your stumps and get in touch with us, as this matter cannot be put off longer. There is also the matter of sending pertinent parts of the record to the United States Supreme Court, and going over matters set down in your statement as mentioned at the beginning of this letter.

Yours truly,

/s/John C. Gager
Member
Board of Directors

EXHIBIT F

Old Town Yacht Basin, Inc.

P.O. BOX 1012 • 500 SOUTH UNION STREET • ALEXANDRIA, VIRGINIA 22313

836-1054

October 17, 1975
Hand Delivered

David Ross Rosenfeld, Esq.
118 South Royal Street
Alexandria, Virginia 22314

Dear David:

Thank you for your letter of October 7. I am herewith hand delivering to you a copy of the city's Supplemental Reply Brief for your use in connection with additional consideration of the matter which you and Marvin Miller, Esq. will undertake on October 20.

I should certainly think you would want to file in the Supreme Court under the 25 day rule on the grounds that the city's above brief does not appear to have been filed in the case, from what we can learn, before the petition was denied.

I should also think you would want to defend against the allegations the city made against you, just as we would want to defend against the further untruthful allegations made by the city therein and the allegations of untruthfulness in Old Town Yacht Basin's affidavits.

We do not think anything was ever done about sending in pertinent facts of the record.

Sincerely,

with attachment

/s/Kathryn B. Lang
Kathryn B. Lang

FEED THROUGH

EXHIBIT G

LAW OFFICES
DAVID ROSS ROSENFELD
POST OFFICE BOX 96
118 SOUTH ROYAL STREET
ALEXANDRIA, VIRGINIA 22313
(703) 548-2600

October 20, 1975

Mrs. Kathryn B. Lang
Old Town Yacht Basin, Inc.
Post Office Box 1012
Alexandria, Virginia 22313

Dear Mrs. Lang:

I have your October 17, 1975 letter. I am delighted to see that you have retained other counsel to represent you, especially in light of the fact that my representation of Old Town Yacht Basin, Inc. was specifically limited to the preparation of a Petition for Writ of Certiorari to the United States Supreme Court. Needless to say, I will be most happy to assist Mr. Miller in familiarizing himself with this case.

I admit, however, to being somewhat puzzled by the text of your letter. Although Mr. Miller has scheduled an appointment with me on Tuesday, October 21, 1975, at 4:30 p.m., I have no knowledge of any matter which either he nor I will be undertaking or were supposed to have undertaken on October 20, 1975.

With regard to your suggestion concerning the filing of a Rule 58 petition for rehearing, I think it should be clear that I have neither the desire nor the intention of filing such a petition. Inasmuch as our reply to the respond-

ent's brief was filed well prior to the October 1, 1975 decision, all matters sought to be presented by us were, in fact, done so prior to entry of the final decision by the Supreme Court denying certiorari. Consequently, the fact that the City's brief was filed after the Supreme Court's decision cleraly indicates that it was not considered by the Court in reaching its decision.

As far as my defending myself against the allegations of the City, I am sure you are aware that I have been called worse by clients. As far as Old Town's desire to defend itself, that is strictly a matter for you people to decide, and which you obviously already have, based upon your representation by Mr. Miller.

As indicated above, I remain available to Mr. Miller to render any assistance and counsel I can, concerning his participation as new counsel in the case.

Very truly yours,

/s/David Ross Rosenfeld
DAVID ROSS ROSENFELD

DRR:ka

cc: Marvin D. Miller, Esquire

FED THROUGH

EXHIBIT H

LAW OFFICES
DAVID ROSS ROSENFELD
POST OFFICE BOX 96
118 SOUTH ROYAL STREET
ALEXANDRIA, VIRGINIA 22313
(703) 548-2600

October 23, 1975

J. Howard Middleton, Jr., Esquire
Assistant City Attorney
Office of the City Attorney
320 King Street—Suite 200
Alexandria, Virginia 22314

RE: City of Alexandria, Virginia
v. Old Town Yacht Basin, Inc.

Dear Howard:

I have a copy of your October 22, 1975 letter to the Aetna Insurance Company regarding the above matter. As previously indicated, my representation of Old Town Yacht Basin, Inc. was limited to the filing of the Petition for Writ of Certiorari in the United States Supreme Court. Inasmuch as the Petition for Writ of Certiorari was denied, my representation of Old Town is terminated.

Very truly yours,

DAVID ROSS ROSENFELD

DRR:ka

cc: Mrs. Kathryn B. Lang

EXHIBIT I

AFFIDAVIT

STATE OF VIRGINIA, City of Alexandria, SS

Personally appeared before me, the undersigned Notary Public, John C. Gager, who hereby affirms that as a member of the Board of Directors of Old Town Yacht Basin, Inc., he accompanied the attorney for Old Town Yacht Basin, Inc. to a pre-trial before Judge Kent in June, 1974, and upon deponent's suggestion, said attorney Herman Lutz asked Judge Kent to withdraw from the case on the grounds that the law firm from which he had recently come, was employed by the City of Alexandria in matters adverse to the interest of Old Town Yacht Basin, Inc., To Wit: The firm had been behind city efforts to dislodge Old Town Yacht Basin, Inc. from property to which it holds a valid title, and also because of the firm's participation on behalf of the City of Alexandria in a Federal waterfront Quiet Title action.

Witness the following signature and seal:

/s/John C. Gager (SEAL)
John C. Gager

Subscribed and sworn to before me this 29th day of October, 1975. My commission expires: March 25, 1978.

/s/Donald C. Wells, Jr.
Notary Public

[SEAL]